IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.124 OF 2006
Along with
Civil Application No.233 of 2006

Tukaram Malhari Kokare and ors, .. Appellants

Vs

Audumber Malhari Kokare and ors .. Respondents.

Mr P.B.Shah, for the appellants.
Mr Umesh Mankapure, for respondent nos 1,2A to 2F.

CORAM : **D.B.BHOSALE,J.**
DATE : 12/03/2007
PC:

1. Heard the learned counsel for the parties.

2. The concurrent judgments of the courts below decreeing a suit for partition and separate possession instituted by the respondent-plaintiffs are under challenge in the instant appeal. The respondent-plaintiffs and defendant nos 1 to 4 are the members of the joint family. Admittedly, the plaintiffs and defendant no.1 are the sons of Malhari whereas defendant nos 2 to 4 are the children of defendant no.1 Tukaram. Initially, the suit was decreed in respect of all the properties except Gat No.275/2/2. This property (Gat No.275/2/2) was allegedly purchased by defendant

no.2-Kundalik and he being a bonafide purchaser for value without notice, the suit was dismissed in respect thereof. The decree was challenged by the original defendant nos 1,3 and 4 in the First Appeal and in the appeal the appellate court decreed the suit in respect of all the properties including Gat no.275/2/2 and hence all the four defendants have challenged the impugned judgments in the instant appeal.

3. Mr Shah, learned counsel for the appellants, submitted that the appellate court committed grave error of law in decreeing the suit even in respect of Gat no.275/2/2 when, admittedly, the plaintiffs had not challenged the said part of the decree in appeal. He then submitted that this is a case of no evidence since the plaintiffs did not step into witness box and the son of plaintiff Nandu, who was examined as a witness on behalf of the plaintiffs, was not even born when the properties were purchased. In the suit, he was examined as a Power of Attorney of the plaintiffs and his evidence was not sufficient to hold that the plaintiffs also contributed with Malhari for purchasing the suit property. In support of this submission, Mr Shah, placed reliance upon the judgment of Janki Vashdeo Bhojwani and anr Vs. Indusind Bank ltd and ors, (2005) 2 SCC 217.

4. Insofar as the first submission is concerned, the law is well settled that in a suit for partition, plaintiff and defendants are parties of equal status. If the right of partition has been recognised and upheld by the Court, merely because only some of the plaintiffs had appealed and not all, the Court was not powerless. It could invoke provisions of Order 41 of Rule 33 of Code of Civil Procedure. The object of Order 41 of Rule 4 is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The Court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant. I, therefore, do not find any illegality in the order passed by the appellate court in respect of Gat no.275/2/2. Insofar as the second submission is concerned, I perused the impugned judgments. Both the courts below, after having considered the entire material on record and particularly the admissions in the evidence of defendant no.1, recorded a finding that the plaintiffs also contributed for purchasing the property by the father Malhari and in view thereof, this submission of Mr Shah also deserves to be rejected. Considering the concurrent findings of facts recorded by the courts below and as I find sufficient material on

record to sustain those findings and considering the extremely limited jurisdiction of this Court under section 100 of C.P.C to disturb the findings of fact, this appeal fails and dismissed as such. As a consequence thereof, the civil application is rejected.

(D.B.BHOSALE,J.)